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No. 86-634

In The
Supreme Court of the United States
October Term, 1986

SANGUINE, Ltd.,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,
DELRA M. TOOHEY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS DELRA M. TOOHEY, ET AL. TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Do this Court's holdings in *Nevada v. United States,* 463 U.S. 110 (1983), and *Arizona v. California,* 460 U.S. 605 (1983) preclude Indian allottees from being heard in defense of their property rights when the allottees timely intervene in three month old litigation in which they are not otherwise adequately represented?

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FEDERAL REGULATION

25 C.F.R. § 212.24(b)(c) 2

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Respondents, Delra M. Toohey, *et al.* ("Allottees"), respectfully urge this Court to deny the Petition for a Writ of Certiorari by which Sanguine, Ltd. ("Sanguine") seeks review of the United States Court of Appeals for the Tenth Circuit's decision in this case, *Sanguine, Ltd. v. United States Dept. of the Interior*, 798 F.2d 389 (10th Cir. 1986).

STATEMENT OF THE CASE

This case has been the subject of two unanimous decisions by different panels of the Tenth Circuit Court of

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Appeals. *Sanguine, Ltd. v. United States Dept. of the Interior,* 736 F.2d 1416 (10th Cir. 1984) (*"Sanguine I"*) and *Sanguine, Ltd. v. United States Dept. of the Interior,* 798 F.2d 389 (10th Cir. 1986) (*"Sanguine II"*).

The facts of the case are both "unique" in modern times and, for the affected Allottees, most unfortunate. The Anadarko Area Office of the Bureau of Indian Affairs ("Anadarko") has jurisdiction over oil and gas operations on Indian trust lands in Western Oklahoma. In 1978, a provision was added to the standard Indian oil and gas lease, which required the release of all non-producing zones at the expiration of the primary term of the lease. Three years later, in 1981, leases issued in 1978 began to expire. Anadarko decided that operators seeking to extend non-productive Indian oil and gas leases through communitization,[1] and without the consent of the Indian lessors, should conform to current leasing policy which required release of non-productive zones at the end of the primary term of the lease. The decision to approve a communitization agreement is entirely discretionary. 25 C.F.R. § 212.24 (b) (c); *Kenai Oil & Gas, Inc. v. Dept. of the Interior,* 671 F.2d 383 (10th Cir. 1982).

In July 1981, Sanguine, an oil and gas operator, sued both to challenge the requirement of release of non-productive zones as a condition of communitization and to compel the Anadarko Area Director to approve specific communitization agreements already submitted on thirteen units. The

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[1] Communitization is essentially a conservation measure whereby several leases are pooled into a single unit for purposes of development and production. This conserves natural resources by eliminating over-drilling and reduces the cost of development since leases are extended by drilling one well per communitized unit, instead of one well per lease.

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Indians whose leases were in the thirteen units directly affected by Sanguine's suit were not notified of the litigation.

Although by Sanguine's own calculations nearly forty-five million dollars in Indian oil and gas rights were at stake in the leases then before the district court, the government took no action to defend the Allottees' interests. As found by the court in *Sanguine I:*

> Here, however, the government in effect conceded the case at the outset. The government did not file a responsive pleading or brief; at the hearing, it called no witnesses and made no significant arguments against Sanguine's motion. Instead, government counsel essentially agreed that Speaks' [the Area Director's] actions were unlawful. [*Sanguine I,* 736 F.2d at 1419.]

Shortly after the hearing on Sanguine's motion for preliminary injunction, which the district court granted, the government agreed to settle the case, again without notice to the affected Allottees:

> In the consent decree, which was entered only thirty-three days after Sanguine filed suit, the government stipulated to all of the facts and to the legal conclusions stated in Sanguine's motion for injunction. [*Sanguine I,* 736 F.2d at 1419.]

Several Allottees attempted to intervene before the district court thirty days after the consent decree was entered. The district court found the Allottees' motion to intervene to be timely, but denied intervention on the basis that the Allottees' rights had been represented adequately by the United States. On appeal, the Tenth Circuit reversed and remanded, with directions to the district court to allow the Allottees to intervene:

> Given appellants' [the Allottees'] interest in enforcing the challenged ruling, it is clear that they are so sit-

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> uated that the consent decree "may as a practical matter impair or impede" their ability to protect that interest. The consent decree enjoins the government from requiring Sanguine to use the Rev. April 1981 Form, and we perceive no means by which appellants could compel the government to violate the decree. Moreover, even if appellants may challenge the government's approval of Standard Form communitization agreements in a separate action, . . . judicial review of agency action may as a practical matter afford the applicant much less protection than the opportunity to participate in proceedings to uphold agency actions in the first place. [*Sanguine I*, 736 F2d at 1420.]

On remand, the district court read the Tenth Circuit's mandate as requiring a hearing on the merits of the case. Thus, the lower court vacated the consent decree, which had disposed of the entire litigation.

Sanguine again appealed to the Tenth Circuit. A different panel unanimously upheld the district court, concluding that:

> Since the government did not contest Sanguine's challenge of the rule and the issues essential to the intervenors [the Allottees] were resolved by consent decree and not adversary litigation, *this case presents a unique situation* in which prejudice to the intervenors can be avoided only by setting aside the prior judgment and allowing the opportunity to litigate the merits of the case. [*Sanguine II*, 798 F.2d at 391 (emphasis added).]

———o———

REASON FOR DENYING THE PETITION

The Decision Below Is Based Upon And Is Consistent With The Holdings Of This Court.

In the "unique" circumstances of this case, the Tenth Circuit's holding was correct and indeed mandated by the principles of due process formulated by this Court.[2] The appeals court's holding does no violence to the decisions of this Court in *Arizona v. California*, 460 U.S. 605 (1983) or *Nevada v. United States*, 463 U.S. 110 (1983).

In finding that the intervenors must be allowed a hearing in this case, the Tenth Circuit discussed *Arizona* and *Nevada* at length and found that these cases "are readily distinguished by the adequacy of the representation afforded the intervenors."[3] *Arizona* and *Nevada* are also distinguished by the timeliness of the Indians' intervention. In those cases, the Indians sought to intervene nearly thirty years after full and open adjudications. By contrast, here the Allottees sought to participate thirty days after a hasty and secretive settlement was reached.

Clearly the Tenth Circuit's decision in this case correctly applied the law. In the context of these unique facts, the appeals court reached the only result possible con-

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[2] *See Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327 n.7 (1979); *Hansberry v. Lee*, 311 U.S. 32 (1940), both holding that *due* process would be denied if a party, not adequately represented in litigation, were to be bound by the results.

[3] *Sanguine II*, 798 F.2d at 391. This distinction also applies to the holding in *Heckman v. United States*, 224 U.S. 413 (1912), a case in which the United States sued successfully to protect the Indians against illegal alienation of their trust land.

sistent with basic notions of due process. The case does not meet the criteria for review by this Court.

CONCLUSION

For the foregoing reason, Respondents, Delra M. Toohey *et al.*, urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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